



Cookie Compliance: “Must try harder”

On 26 May 2011, amendments to the Privacy and Electronic Communications (EC Directive) Regulations 2003 came into force, requiring consent to be obtained for the storage of cookies on a computer or mobile device. As identified in our article¹ of June 2011, the new law has far-reaching and potentially onerous implications.

Half-Term Report

When the new law came into force, the Information Commissioner's Office (ICO) indicated that it would allow a grace period of 12 months before taking any enforcement action. We are now halfway through this stage, prompting the ICO to produce a half-term report² with updated guidance³ on the current state of cookie compliance. The report concludes that UK website owners “must try harder” to become cookie compliant.

The updated guidance represents the ICO's most comprehensive effort to date in addressing the concerns and unanswered questions from those tasked with becoming compliant. However, the ICO will not offer prescriptive check lists detailing how compliance should be achieved. As the Information Commissioner states, “*Those actually running websites are far better placed to know what will work for them and their customers.*” In practice, this means that with almost every assertion or piece of practical advice given by the ICO you can expect a caveat. This is because there is no one-size-fits-all solution to cookie compliance and the ICO do not want to be seen to be offering one.

Consent

The updated guidance tells us that “*consent must involve some form of communication where the individual knowingly indicates their acceptance.*”

There was previously confusion as to whether such consent had to be prior consent, ie given before the cookies are set. The updated guidance clarifies that prior consent will generally be required and that setting cookies before users have had the chance to make an informed decision about those cookies is likely to present compliance problems. Several solutions are suggested to gain prior consent such as pop-ups or splash

pages, or website terms and conditions.

However, the ICO recognises that prior consent presents potential usability issues for many websites and may not always be possible. In such cases, websites should reduce the amount of time as much as possible before the user receives information about cookies and is provided with options. The ICO also suggests the risk of enforcement action can be mitigated by replacing persistent (permanent) cookies with less intrusive session (temporary) cookies.

A highly visible footer notice asking for a user's consent to a cookie policy could be a useful way of obtaining consent. The ICO have suggested that should a user ignore the request of a clear footer notice and continue using a website it could suggest implied consent.

However, this is slightly inconsistent with other aspects of the guidance: the ICO states that while websites may be able to rely in part on implied consent from users, if they understand that cookies will be set, are clear about what they do and signify their agreement, at present general awareness of the functions and uses of cookies is simply not high enough for websites to look to rely entirely in the first instance on implied consent. This seems to confirm that some degree of prior consent will still be required, although this may change in the future, if, for example, initiatives such as youronlinechoices.eu, Do Not Track and enhanced browser settings improve users' general awareness and understanding of cookies, and give them greater control of which cookies are set.

The updated guidance gives a number of practical examples of “quick wins” to be had that will increase the understanding of users more quickly, namely:

- Ensure the link to your cookie policy is not simply labelled “privacy policy” – consider, for example “Read about how we use cookies”;
- Highlight your cookie policy link by changing the link's size/ font;
- Place the link in a more prominent position on your webpage.

¹ http://www.burgess-salmon.com/Practices/commercial/Publications/New_optin_cookie_law_in_force.pdf

² <http://www.ico.gov.uk/news/blog/2011/half-term-report-on-cookies-compliance.aspx>

³ http://www.ico.gov.uk/news/blog/2011/-/media/documents/library/privacy_and_electronic/practical_application/guidance_on_the_new_cookies_regulations.ashx

Compliance

The latest report reiterates the ICO's advice from its previous guidance. Organisations should:

- 1 Audit the cookies they use and 'clean up' any unnecessary cookies;
- 2 Assess how intrusive the remaining cookies are to users' privacy (the more intrusive a cookie is, the more likely the issue of consent will need to be addressed); and
- 3 Decide what solution to obtain consent will be most appropriate.

Exemptions

Cookies that are "strictly necessary" to provide services expressly requested by a user remain exempt under the new law. The ICO has reaffirmed its narrow definition of this exception, meaning the "shopping basket" cookie remains the only concrete example of a cookie likely to fall under this exemption.

Web analytics cookies are expressly excluded from this exemption. However, on the issue of analytical cookies, the ICO has commented that *"it is highly unlikely that priority for any formal action would be given... where there is a low level of intrusiveness"*. This suggests the ICO will not be too concerned to take enforcement action in respect of analytical cookies.

The updated guidance also tells us that intranets will not be subject to the same rules provided employers are not using them to collect personally identifiable information.

Responsibility for Compliance

Ultimately, responsibility lies with the person setting the cookie. Where third party cookies are set on a website the ICO suggests organisations should take a collaborative approach. In reality the likes of Facebook, Amazon, Google etc will place contractual obligations into agreements with web publishers essentially shifting the burden of obtaining informed consent to those websites using third party cookies.

Conclusions

Although the ICO makes it clear that there will be no knee-jerk formal enforcement action when the lead-in period ends (26 May 2012), organisations should already be well on the way to working towards compliance.

Compliance is an ongoing process and with no one-size-fits-all solution; organisations should be looking at peers within their industry and sector levels.

If others in your area of business are taking strides towards cookie compliance, the ICO might reasonably ask "if they can do it, why can't you?"

If you have any questions on the issues raised in this update or would like further information of best practice in respect of compliance with the Legislation please contact:



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